No. 11126

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Appellee.

APPELLEE'S BRIEF.

PILLSBURY, MADISON & SUTRO,
LAWLER, FELIX & HALL,
FELIX T. SMITH,
JOHN A. SUTRO,
JOHN M. HALL,
800 Standard Oil Building, Los Angeles 15,
Proctors for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

PAGE

III.

IV.

TABLE OF AUTHORITIES CITED.

Statutes.

Textbooks.

No. 11126

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation,

Appellee.

APPELLEE'S BRIEF.

Statement Showing Jurisdiction.

Appellee sued in the District Court under the Suits in Admiralty Act (46 U. S. C. A. secs. 741-752, incl.). Its libel so alleged (4).[1] These allegations of the libel were admitted by the answer (7). The District Court had jurisdiction of the cause under section 2 of the Suits in Admiralty Act (46 U. S. C. A. sec. 742).[2]

This Court has jurisdiction of this appeal under the appeal statute (28 U. S. C. A. sec. 225, subdv. (a) First and (d)) which applies to final decrees in admiralty.

Appellant's Opening Brief (p. 2, *et seq.*) correctly states the statutory provisions and pleadings necessary to show the existence of jurisdiction.

---

[1]Numbers in parenthesis, unless otherwise noted, refer to pages of the Apostles on Appeal. References to "Brief" are to pages of Appellant's Opening Brief. Italics throughout have been added.

[2]In *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692, 698 (9 C. C. A., 1945), this Court has pointed out that this section "makes provision for the United States' liability both as a common carrier and, . . . a private carrier . . ."

Statement.

In addition to the "Statement of Facts" which will be found in Appellant's Opening Brief (p. 4, *et seq.*) attention is invited to the following:

The District Court found that appellant, before and at the beginning of the voyage, and also during the voyage, failed to exercise due diligence to make the vessel seaworthy, or properly man or equip or supply the vessel, or make the parts thereof in which cargo was carried fit or safe for the reception of the same or its carriage or preservation, and that appellant failed to properly or carefully handle, carry, keep, care for or discharge the cargo, and that appellant negligently and improperly handled, carried, cared for and discharged the cargo, and that the damage complained of was a direct and proximate result of the foregoing (46, 47).

These findings were supported by the evidence. As stated in the opinion of the District Court appellant at no time made any explanation accounting for the contamination, and, although its representatives inspected the vessel shortly after the contamination was discovered, would admit nothing, except that the cross-over valves on tank 5 were found partly open (34). The District Court also stated that appellant was guilty of a failure to exercise due diligence in not using spectacle flanges (33, 34).

These findings are not attacked either by the assignment of errors (59, *et seq.*) upon which appellant relies (342), or by the argument in Appellant's Opening Brief.[3]

---

[3]One assignment of error touches a single feature of this, *viz.*, No. 14, which declares that the "District Court erred in finding that respondent failed to exercise due diligence to make the vessel seaworthy by not using spectacle flanges during the voyage and discharge." (61) However, this assignment of error is not made the basis of any argument or contention in the opening brief.

Accordingly it is undisputed that the damage complained of occurred because appellant:

(A) Failed to exercise due diligence to make the vessel seaworthy, and

(B) Failed to properly or carefully handle, carry, keep, care for or discharge the cargo, and

(C) Negligently and improperly handled, carried, cared for and discharged the cargo.

Nor is there any dispute concerning bases or computations employed in arriving at the damages, except that appellant contends (Brief 26, *et seq.*) that appellee was not legally entitled to a part of the damages so based and computed, and (Brief 38, *et seq.*) that appellee was not entitled to recover attorneys' fees, and that the award thereof was excessive.

Argument herein for affirmance of the judgment will be addressed to the following points:

I. The Carriage of Goods by Sea Act governed the rights and duties of the parties, and appellant was liable for a breach of such duties.

II. Even if the Carriage of Goods by Sea Act had not been made a part of the contract of the parties, appellant was nevertheless liable for a breach of its duties as bailee for hire, despite paragraph 19 of the charter party.

III. Damages were properly allowed for the contaminated products discharged from the vessel and for the products already in the shore tanks into which such contaminated products were run.

IV. Damages allowed properly included the award on account of attorneys' fees.

ARGUMENT.

I.

The Carriage of Goods by Sea Act Governed the Rights and Duties of the Parties, and Appellant Was Liable for a Breach of Such Duties.

(1) The Charter Party Made the Carriage of Goods by Sea Act a Part of the Contract of the Parties, Paramount Over Any Part of Such Contract in Conflict Therewith.

By its terms the Carriage of Goods by Sea Act of April 16, 1936 (46 U. S. C. A. sec. 1300, *et seq.*) is made applicable "to all contracts for carriage of goods by sea to or from parts of the United States in foreign trade." By its terms it is also made applicable to contracts for the carriage of goods by sea between ports of the United States if the "bill of lading or similar document of title which is evidence of a contract for the carriage of the goods" contains "an express statement that it shall be subject to" the provisions of the Act (46 U. S. C. A. sec. 1312).

In the instant case the charter party includes a "clause paramount" (par. 25), which provides that the Carriage of Goods by Sea Act shall be deemed to be incorporated in all bills of lading issued under such charter party. This clause reads as follows:

> "25. Clause Paramount. All Bills of Lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated therein, and nothing therein or herein contained shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities

under said Act. If any term of any Bill of Lading issued hereunder be repugnant to said Act to any extent, such term shall be void to that extent but no further." (Brief, Appendix 25.)

This mandate of the charter party that the bills of lading "shall have effect subject to" the Act was carried out by Captain Olsen of the Egg Harbor in issuing bills of lading on April 17, 1943 and April 18, 1943 at San Pedro and El Segundo. These bills of lading contained a rubber-stamped clause reading:

> "This bill of lading shall have effect subject to the provisions of the carriage of goods by Sea Act of the United States, Approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its Rights or Immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further."[4] (19, 20.)

Under the Carriage of Goods by Sea Act the parties were authorized to contract so as to make the Act a part of their contract of carriage. They did so in the exact

---

[4]A clause in this form, rubber-stamped on the margin of a bill of lading, was considered in *The Steel Inventor*, 35 F. Supp. 986, 997 (Md. 1940), where it was held that such *rubber-stamped* clause prevailed over a clause in conflict therewith *printed* in the bill of lading. See, also, *Toyo Kisen Kaisha v. W. R. Grace & Co.*, 53 F. (2d) 740, 744 (9 C. C. A. 1931), to the effect that a stipulation stamped on the face of a bill of lading is deemed a part of such bill and is binding on the parties.

method prescribed by the Act.[5] It should be noted that 46 U. S. C. A. sec. 1312 does not expressly provide for incorporating the Act in the charter party itself, but provides that any *bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea* between ports of the United States, containing an express statement that it shall be subject to the provisions of the Act, shall be subject thereto. In compliance with this express statutory authority and with the method thereby prescribed, the charter party provided in par. 25 that all bills of lading issued thereunder should have effect subject to the provisions of the Act. The actual form of the bill of lading was also prescribed in the charter party itself, and par. 24 of the charter party authorized its issue by the Master. Par. 25 further states that "nothing therein or *herein* contained [meaning nothing in the bill of lading *or in the charter party*] shall be deemed a surrender by the Owner of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act." It is difficult to imagine a more com-

---

[5]The Act (46 U. S. C. A., Sec. 1312) reads:

". . .

"Provided, however, that any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter and Section 25 of Title 49, shall be subject hereto as fully as if subject hereto by the express provisions of this chapter and Section 25 of Title 49:".

Section 25 of Title 49 referred to above related to the filing with the Interstate Commerce Commission of quotations of rates for scheduled sailings by common carriers by water in foreign commerce, and the reservation by railroads of space at such rates in the vessels of such carriers, and the issuance of through bills of lading covering such rail and water shipments, etc. This section was repealed September 18, 1940, by 54 Stat. 919.

prehensive method of incorporating the Act into the contract of carriage and it is submitted that the representatives of the Government who drafted the charter party fully intended to make the Act a part thereof and, to remove any doubt on this score, adopted the precise method of incorporating its terms set forth in the Act itself.

Appellant's argument is that the bill of lading should be treated as a receipt in this case, because the charter party was one of private carriage under which appellee had the use of the entire cargo space of the vessel, and in support of this contention relies on *The G. R. Crowe,* 294 Fed. 506 (2 C. C. A. 1924), and *The Fri,* 154 Fed. 333 (2 C. C. A. 1907). In both of those cases, however, the bill of lading which was issued conflicted with the charter party, and the Court held in each case that the terms of the bill of lading would not be permitted to alter the terms of the charter party, because the charter party expressed the entire contract of carriage between the parties. Obviously, this is not the situation in the present case, as here the charter party itself sets forth the terms and the form of the bill of lading. The bill of lading, or document of title, or, to use the contention of appellant, the "receipt," was issued pursuant to the express authority and in conformance with the express terms of the charter party. Whether the document issued as authorized and in the form prescribed by the charter party was a bill of lading, as it was entitled, or a receipt is immaterial in this case because its issuance and its terms and conditions are authorized by the contract of carriage and hence they became part of the contract of carriage.

Since the Carriage of Goods by Sea Act was a part of the contract between the parties, par. 19 of the charter party may not be availed of to relieve appellant from liability for a breach of its duties under the Act.[6]

The Act expressly forbids any impairment or curtailment of the carrier's statutory obligations.[7] Moreover, the charter party by express language made the Act "paramount" over other charter party clauses, *i. e.*, the paragraph in the charter party (par. 25) which made the Act applicable to this shipment was labeled "paramount." By this the parties obviously intended that the Act should prevail in the event of any conflict between a charter party clause and the Act. Otherwise the word "paramount" is meaningless.[8]

---

[6]Par. 19 of the charter party purports to relieve the vessel from responsibility "for any consequences arising out of shipping more than one grade of cargo." (Brief, Appendix 11.)

[7]The Act reads (46 U. S. C. A., Sec. 1303 (8)):

"(8) *Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter or section 25 of Title 49, shall be null and void and of no effect.* A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability."

Section 25 of Title 49 referred to in the foregoing related to the filing with the Interstate Commerce Commission of quotations of rates for scheduled sailings by common carriers by water in foreign commerce, and the reservation by railroads of space at such rates in the vessels of such carriers, and the issuance of through bills of lading covering such rail and water shipments, etc. This section was repealed September 18, 1940, by 54 Stat. 919.

[8]The word "paramount" is defined as: "Having a higher or the highest rank or jurisdiction; superior to all others; chief, supreme; pre-eminent." Webster's New International Dictionary, 2nd Ed. (1940), p. 1773.

The following cases presented substantially the following situation: (A) a private carrier; (B) a contract of carriage making the shipment subject to the provisions of the statute;[9] and (C) a provision of the contract of carriage under which the carrier claimed immunity but which appeared to be at variance with the carrier's obligations under the statute. Each of these cases held that the immunity provision *must yield to the statutory obligation.*

In *The Framlington Court,* 69 Fed. (2d) 300 (5 C. C. A. 1934; *certiorari* denied in 292 U. S. 651), the charter party expressly incorporated the Harter Act. The charter party also expressly provided that the vessel might "sail without pilots." The vessel stranded while on her way to sea without a pilot. A libel was brought against the vessel by a shipper who had chartered the entire vessel and whose goods were lost or damaged, as a result of the stranding. In reversing a judgment dismissing the libel, the court pointed out that the provision that the vessel might "sail without pilot" was inconsistent with and must give way to the general obligation to use due diligence to render the vessel seaworthy incorporated in the charter by the charter's adoption of the Harter Act.

In *The Agwimoon,* 24 Fed. (2d) 864 (Md., 1928; aff. in 31 Fed. (2d) 1006), an oil tanker was carrying a cargo from California to Baltimore under a charter party which declared that the shipment was subject to all of the terms of the Harter Act. The charter party also provided: "The steamer is not to be accountable for leakage."

---

[9]In each of these cases the statute incorporated as a part of the contract of carriage was the Harter Act (46 U. S. C. A., Secs. 190-194, incl.).

When the tanker arrived at Baltimore, a part of the cargo was found to have been lost by leakage. Libel was brought by the purchaser of the oil to recover for such loss.

The Court said (p. 867):

> ". . . The final question is whether the leakage clause operates to relieve the vessel from liability."
>
> * * * * * * * *
>
> "The parties have agreed to make the act applicable to their contract, and have expressly incorporated it, not merely in the bill of lading, as was the case in The G. R. Crowe, *supra,* upon which respondent relies, but in the charter party itself. If the act is not effectuated in the same manner, that it would be for a common carrier—that is, in all its terms—then the agreement amounts to nothing."

In *The Cornelia,* 15 Fed. (2d) 245 (N. Y., 1926), a libel was filed by the consignee of a cargo for damage thereto by sea water. By the contract of carriage it was mutually agreed that such contract should be subject to all the terms and provisions of the Harter Act. In decreeing in favor of libelant, the Court said (p. 247):

> "The regular form of bill of lading, of which a copy was annexed to the contract of carriage, and under which the shipment was made, contains an exemption from liability for loss or damage occasioned by sea water, wetting, drainage, leakage, or wastage. The loss in this case was clearly within the language of this exemption, . . . Respondent contends that the exemption applies, unaffected by the provisions of sections 1 and 2 of the Harter Act, because in so far as full cargoes are concerned *the contract was one of private carriage,* relying upon The G. R. Crowe (C. C. A.), 294 F. 506, and similar decisions.

> *But here the parties agreed that their contract should be governed by all the provisions and exemptions of that act.* Necessarily exemptions contained in the contract and in the bills of lading, the provisions of which were embodied in the contract, are, as the parties agreed they should be, subject to the provisions of the Harter Act, not because the agreement of carriage is a shipping document within the meaning of that statute, *but because the parties themselves agreed that the statute should apply to their contract of carriage. The contract of carriage thus being subject to the provisions of the Harter Act, its exemptions cannot relieve the vessel or her owners from liability for loss or damage arising from negligence in proper loading, stowage, custody or care of the cargo, or from failure to exercise due diligence to make the vessel seaworthy."*

In *The Ferncliff,* 22 F. Supp. 728 (Md., 1938; aff. in 105 Fed. (2d) 1021), a charter party executed by a private carrier contained a provision that it should be "subject to all the terms and provisions of" the Harter Act. The carrier claimed immunity under a bill of lading clause exempting the carrier from liability for loss due to "heating," the cargo loss in this case having been due to heating. It was pointed out (p. 736) that if the Harter Act were applicable, this bill of lading clause must be held to be invalid. In decreeing for libelants, the Court said (p. 737):

> "The ship contends that these sections of the Harter Act are not applicable because, the ship having been wholly chartered for this voyage by Mitsubishi, was a private and not a common carrier. . . . And it has been frequently held that a private carrier by water may make its own contract for carriage includ-

ing an exemption from liability for its own negligence, and will not be bound by the Harter Act unless it is expressly incorporated in the charter agreement. . . . This contention, however, seems untenable as I find on examination of the charter party that it provides—'It is also mutually agreed that this contract is subject to all the terms and provisions of, and all the exemptions from liability contained in an Act of Congress of the United States approved on the 13th day of February, 1893, entitled "An Act Relating to Navigation of Vessels, etc." ' (the Harter Act). As the ship is basing its position in this respect on the charter party, it cannot escape the particular provision of the charter with regard to the Harter Act."

(2) The Charter Party Must Be Strictly Construed Against Appellant.

It is our contention that par. 25 of the charter party is not ambiguous; that it discloses a clear intent to make the Carriage of Goods by Sea Act a part of the contract of carriage.

However, if par. 25 is ambiguous, such ambiguity must be resolved against appellant.

The charter party here involved was drawn by agents of appellant. It is on a printed form headed "Form No. 104—Warshipoilvoy 6/1/42." Use of this form was required by an order of the War Shipping Administration which is published in the Federal Register of June 10, 1942, p. 4386, *et seq.* Such order sets forth *in extenso* all

of the paragraphs of Part II, as well as the form of Part I, of such charter party.[10]

Also, contrary to the suggestion in appellant's brief (pages 10, 11), that the bills of lading were prepared by appellee, the bills of lading signed by Captain Olsen were in the form prepared by appellant and prescribed by the charter party. All appellee did was to fill in the appropriate blank spaces, which in no way affected the terms and conditions contained in the form itself.

Not only was the contract prepared by agents of appellant, but if any contract at all were to be concluded it was requisite that the prescribed form be adopted.

A contract between a corporation and the United States is to be construed and the rights of the parties are to be determined by the application of the same principles as if the contract were between individuals.

> *Reading Steel Casting Co. v. United States,* 268 U. S. 186, 188 (1925).

Accordingly it has been held that where a contract between the United States and a corporation has been drawn by agents of the United States it must be construed most strongly against the United States.

---

[10]Such order, exclusive of recitals and the form of the charter party prescribed, is as follows:

"*Now, therefore, it is hereby ordered,* That:

"§301.2a. *Uniform tanker voyage charter party.* (a) Voyage charters entered into by the United States of America, acting by and through the Administrator, War Shipping Administration, or his duly appointed agents, for the carriage of Petroleum and/or its products in bulk on vessels the use of which has been requisitioned or acquired by the United States on a time charter basis, shall consist of two parts, designated respectively, Part I and Part II.

"(b) The form of Part I of said voyage charter shall be as follows:"

Scully v. United States, 197 Fed. 327, 343 (Nev. 1912);

United States v. A. Bentley & Sons Co., 293 Fed. 229, 235 (Ohio, 1923, aff. in 16 Fed. (2d) 895).

(3) Appellant Breached the Duties Imposed Upon It Under the Carriage of Goods by Sea Act.

As to this there can be no dispute in view of the findings which are unassailed.

As heretofore pointed out, the District Court found that appellant, before and at the beginning of the voyage, and during the voyage, failed to exercise due diligence to make the vessel seaworthy, or properly man or equip or supply the vessel, or make the parts therein in which cargo was carried fit or safe for the reception of the same or its carriage or preservation, and that appellant failed to properly or carefully handle, carry, keep, care for or discharge the cargo, and that appellant negligently and improperly handled, carried, cared for and discharged the cargo, and that the damage complained of was a direct and proximate result of the foregoing (46, 47).

Appellant's Opening Brief does not attack these findings.

These findings disclose a clear breach of the carrier's obligations under the Carriage of Goods by Sea Act.[11]

---

[11]This Act (46 U. S. C. A., Sec. 1303) reads in part:

"(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

"(a) Make the ship seaworthy;

"(b) Properly man, equip, and supply the ship;

"(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

"(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

". . ."

II.

Even If the Carriage of Goods by Sea Act Had Not Been Made a Part of the Contract of the Parties, Appellant Was Nevertheless Liable for a Breach of Its Duties as Bailee for Hire, Despite Paragraph 19 of the Charter Party.

(1) If the Act Had Not Been Expressly Made a Part of the Contract of Carriage, the Relation of the Parties Would Have Been That of Bailor and Bailee for Hire.

Parties to a private carrier contract may make the Carriage of Goods by Sea Act a part of their contract.[12]

Assume, for the purposes of argument only and without conceding, that in this case the Carriage of Goods by Sea Act was not a part of the contract and does not govern the rights and duties of the parties, the case presented is that of bailor and bailee, and the rights and duties of appellant were those of a bailee for hire.[13]

---

[12]See *The Framlington Court,* 69 F. (2d) 300 (5 C. C. A. 1934); *The Agwimoon,* 24 F. (2d) 864 (Md., 1928, aff. in 31 F. (2d) 1006); *The Cornelia,* 15 F. (2d) 245 (N. Y., 1926); and *The Ferncliff,* 22 F. Supp. 728 (Md., 1938, aff. in 105 F. (2d) 1021), previously cited, in which the Harter Act was made a part of the charter party, and in which the Act was held to control over inconsistent contract clauses under which the carrier claimed immunity.

[13]*Commercial Corp. v. N. Y. Barge Corp.,* 314 U. S. 104, 110, 111 (1941); *The Fri,* 154 Fed. 333, 338 (2 C. C. A. 1907); *The Wildenfels,* 161 Fed. 864, 866 (2 C. C. A. 1908); *The C. R. Sheffer,* 249 Fed. 600, 601 (2 C. C. A. 1918); *The G. R. Crowe,* 294 Fed. 506, 508 (2 C. C. A. 1923); *The W. H. Davis,* 56 F. Supp. 564, 567 (N. Y., 1944).

(2) Appellant Breached the Duties Imposed Upon It as a Bailee for Hire.

As already pointed out, the District Court found that appellant, before and at the beginning of the voyage, and during the voyage, failed to exercise due diligence to make the vessel seaworthy, or properly man, equip or supply the vessel, or make the parts thereof in which cargo was carried fit or safe for the reception of the same, or its carriage or preservation, and that appellant failed to properly or carefully handle, carry, keep, care for or discharge the cargo, and that appellant negligently and improperly handled, carried, cared for and discharged the cargo, and that the damage complained of was a direct and proximate result of the foregoing (46, 47), and that these findings are not attacked.

A bailee of goods for hire is certainly liable for these breaches of duty.[14]

The only remaining question is whether appellant was relieved of liability by par. 19 of the charter party.

---

[14]Speaking of the obligations of a shipowner under a private contract of carriage it was said in *Commercial Corp. v. N. Y. Barge Corp.*, 314 U. S. 104, 110 (1941): "But, as the court below held, the bailee of goods who has not assumed a common carrier's obligation is not an insurer. His undertaking is to exercise the care in the protection of the goods committed to his care and to perform the obligation of his contract including the warranty of seaworthiness when he is a shipowner."

See, also, *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692 (9 C. C. A. 1945), where the government undertaking to act as a private carrier was held liable for negligence.

(3) Under the Facts Presented, Paragraph 19 of the Charter Party Did Not Relieve Appellant From Liability for a Breach of Its Duties as a Bailee for Hire.

Appellant's contention is that par. 19 of the charter party states that the vessel "shall not be responsible for . . . any consequences arising out of shipping more than one grade of cargo;" that the contamination which occurred in this case was a "consequence arising out of shipping more than one grade of cargo;" (Brief, Appendix 11) hence the carrier was not liable. (Brief 22, *et seq.*)

Appellant's contention is contrary to the finding of the District Court that the contamination complained of was the "direct and proximate result" of appellant's negligence and failure to exercise due diligence, and *"not . . . a consequence arising out of shipping more than one grade of cargo"* (46, 47).

It is submitted that appellant's contention is not well taken.

This clause in par. 19 of the charter party must be construed most strongly against the carrier. As said in *The Framlington Court,* 69 Fed. (2d) 300, 303 (5 C. C. A. 1934; *certiorari* denied in 292 U. S. 651), where the vessel was not a common carrier:

> *"Any exception in the charter in favor of the shipowner is to be most strongly construed against him, especially if it tends to weaken the warranty of seaworthiness."*[15]

---

[15] To the same effect, see *Compania la Flecha v. Brauer,* 168 U. S. 104, 118 (1897); *The Caledonia,* 157 U. S. 124, 137 (1895). Also note the authorities hereinbefore cited under point I (2) to the effect that the charter party here involved must be strictly construed against appellant.

Construed most strongly against the carrier, this clause in par. 19 of the charter party has no application, for the mingling of the two products was not a "consequence arising out of *shipping*" more than one grade of cargo. The fact that two products were shipped did not occasion the mingling. Cargoes of different kinds of petroleum products are frequently carried without any mingling of the several products. The mingling which occurred in this case was not, in the language of this clause, a "consequence arising out of shipping more than one grade of cargo," but was rather a consequence of the carrier's negligence and failure to exercise due diligence.

The construction of this clause contended for by appellant (*i. e.,* that the mingling which occurred was a consequence of the shipping of more than one grade of cargo, hence an injury for which the vessel was not responsible) would lead to serious consequences, manifestly contrary to the intent of the parties. If appellant's construction be correct and be carried to its logical conclusion, *the single fact that more than one product was carried would in every case relieve the carrier from liability for all damage to either product no matter how such damage occurred.* For example, if appellant's construction be correct, two products might have been put in the same tank and the carrier could nevertheless successfully urge its non-liability for the damage thus resulting on the ground that it was a "consequence" of more than one product being carried. This construction should not be accepted. This clause should be held to have no application to the mingling of the products involved in this suit caused by appellant's negligence and failure to exercise due diligence.

Appellant contends (Brief 25) that its construction of par. 19 of the charter party is reasonable because of war conditions prevailing when the charter was made. Of course war conditions called for the utmost speed in the handling of cargoes of petroleum products. But this very circumstance required even greater diligence and care in the handling of these cargoes, lest negligence should produce additional and unnecessary delay as it did in this case.[16] Certainly when speed in transfer was a prime requisite, it was more than usually disastrous for this cargo of gasoline and diesel to be rendered worthless by careless mingling, thus requiring the whole to be shipped back to the refinery for re-refining. Accordingly it is not fair to assume that the parties intended to insert in the charter a clause which might encourage carelessness by purporting to relieve the carrier and its agents from liability for carelessness.

Furthermore, every presumption should be indulged *against* a construction of par. 19 which would turn it into a stipulation freeing the carrier from liability *for its own negligence*. Even in the case of private carriers, the courts have shown a marked disinclination to construe exculpatory clauses of a general character so as to relieve the carrier from liability for its own negligence.

In *California Nav. & Improvement Co. v. Stockton Mill. Co.*, 184 Fed. 369 (9 C. C. A. 1911) libelants made an oral contract with a transportation company to move flour from South Vallejo to Stockton for compensation at an

---

[16]Cf. *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692, 696 (9 C. C. A. 1945), in which this Court pointed out that war conditions *emphasized* the necessity of a proper inspection of a government lighter carrying cocoa beans to a vessel in the harbor of Pago Pago.

agreed rate, which was less than the usual freight rate, such reduction being made in consideration of a condition of the contract that the flour should be carried in open barges *and at the libelants' risk.* The flour was damaged as a result of the negligence of the transportation company. Obviously, under this contract the transportation company was acting as a private carrier. The transportation company urged that libelants' agreement to assume risks relieved it from responsibility. Disallowing this contention and affirming a decree awarding damages this Court said (pp. 370, 371):

> "The averments in the libel, that the appellant was employed to transport the flour in its character as a common carrier, and that the barge was unseaworthy, are superfluous, because another sufficient ground supports the decree of the District Court awarding damages to the libelants. Negligence of the appellant in failing to exercise due care for the safety and preservation of that part of the cargo which had been delivered into its custody is charged in the libel as a cause of the loss and ground of liability, and that charge is well sustained by proof of the facts recited in the foregoing narrative.
>
> * * * * * * * *
>
> The libelant is not shielded from responsibility for the consequences of its negligence by the agreement of the libelant to assume risks. That agreement, according to the evidence, was vague and uncertain, and no ultra liberal construction of the contract to shift responsibility from a wrongdoer deserves judicial sanction. By its undertaking the appellant became obligated to exercise ordinary care and diligence in handling the libelant's property and to furnish seaworthy barges and competent servants, and certainly

risk of loss by its failure to perform the contract in good faith was not contemplated as one of the risks assumed by the libelants."

In *Colton v. New York & Cuba Mail S. S. Co.,* 27 Fed (2d) 671 (2 C. C. A. 1928), the Court, in affirming an award of damages for injury to a cargo shipped under a contract with the Ward Line, which stated that the shipment should be "at the sole risk of the owners of the goods," said (p. 674):

> "But, irrespective of whether the Ward Line was a common carrier, the defendants were properly held liable for their own negligence. The words, 'at the sole risk of the owners of the goods,' in a contract prepared by the Ward Line, which seeks to limit its liability, are to be strictly construed. Smith v. Booth (C. C. A.) 122 F. at p. 628. They do not in terms cover the *negligence* of the carrier, and were not held sufficient to avoid liability in Vitelli v. Cunard S. S. Co. (C. C. A.) 203 F. 697, and The Ogeechee (D. C.) 248 F. 803."

In *The Ogeechee,* 248 Fed. 803 (Pa., 1918), the Court, decreeing recovery of damages for injury to a cargo, said (pp. 805, 807):

> "By the agreement between the parties as disclosed by the bill of lading and the charter-party, it was provided that lighterage should be 'at the risk and expense of the cargo.'
>
> * * * * * * * *

> "Indeed, in view of the facts established by the evidence I deem it unimportant to the decision of this case whether the Ogeechee undertook the carriage of its cargo as a common carrier or only as an ordinary bailee for hire; for in either case there was such culpable negligence on the part of the respondent as to make her liable for the resulting damage."

The meaning of par. 19 relieving the vessel from responsibility "for any consequences arising out of shipping more than one grade of cargo" should be determined only after a consideration of the entire charter.

Par. 1(a) of the charter party contains warranties that the vessel is "tight, staunch and strong" and that "all pipes" are "in good working order," and that she is "in every respect fitted for the voyage, so far as the foregoing conditions can be attained by the *exercise of due diligence.*"[17] (Brief, Appendix 3.)

Par. 20(a) of the charter party provides that the vessel shall not, unless otherwise provided, "be responsible for any loss or damage . . . arising or resulting from . . . unseaworthiness of the vessel unless caused *by want of due diligence* on the part of the Owner to make the vessel seaworthy or to have her properly manned, equipped and supplied; or from any other cause of whatsoever kind arising without the *actual fault* or privity of the Owner. . . ." (Brief, Appendix 11, 12.)

---

[17]These declarations were express warranties. *The Framlington Court,* 69 F. (2d) 300, 303 (5 C. C. A. 1934, certiorari denied in 292 U. S. 651); *The Nordhvalen,* 6 F. (2d) 883 (Md., 1925).

The foregoing certainly convey the clear implication that appellant *shall be liable* for loss or damage arising or resulting:

(A) Because the vessel was not fitted for the voyage because of her owner's failure to *exercise due diligence.*

(B) Because the vessel was not seaworthy because of the owner's *want of due diligence* to make her seaworthy.

(C) Because the vessel was not seaworthy because of the owner's *want of due diligence* to have her properly equipped and supplied.

(D) Because of some cause arising from the *actual fault* of the owner.

Certainly these clear implications showing an intent to make the ship owner liable in the event of its *fault* or *failure to exercise due diligence* should be considered in determining the intent and meaning of par. 19. If the latter is to be construed as relieving from liability whenever more than one grade of cargo was carried, *irrespective of the owner's fault or lack of due diligence,* then there is a conflict between par. 19 and other parts of the charter which, under the rules of construction here applicable, should be resolved against appellant. A proper construction and application of par. 19 to the facts of this case is that the damage was not a "consequence arising out of shipping more than one grade of cargo," but was a consequence of appellant's fault and lack of due diligence, for which par. 19 affords appellant no protection.

III.

Damages Were Properly Allowed for the Contaminated Products Discharged From the Vessel and for the Products Already in the Shore Tanks Into Which Such Contaminated Products Were Run.

Before the parties knew of the contamination 8,140 bbls. of contaminated gasoline from the vessel were run into shore tank 62, where it contaminated 11,339 bbls. of merchantable gasoline already in such tank (79, 248), and 23,131 bbls. of contaminated diesel from the vessel were run into shore tank 8, where it contaminated 2,376 bbls. of merchantable diesel already in such tank (79, 115, 248).

It is not disputed that the 11,339 bbls. of gasoline already in shore tank 62, and the 2,376 bbls. of diesel in shore tank 8 were good and merchantable products before the contaminated products from the vessel were run into these tanks.

Appellee claims and the District Court awarded it damages, not only for the contaminated products discharged from the vessel, but also for the damage to the previously uncontaminated products in shore tanks 62 and 8, into which the contaminated cargo was poured.

Appellant contends (A) that no damages should have been awarded for the contents of the shore tanks which were contaminated when contaminated products from the vessel were poured into them (Brief 32, *et seq.*), and (B) that in any event no damages should have been awarded with respect to a quantity of diesel which was run into shore tank 8 between 9:30 P. M. on April 23, 1943 and 6:00 A. M. on April 24, 1943, since appellee was under

a duty to minimize damages with respect to such quantity. (Brief 36, *et seq.*)

It is submitted that these contentions are not well taken.

(1) Damages Were Properly Allowed for the Contents of the Shore Tanks Which Were Contaminated When Contaminated Products From the Vessel Were Run Into Them.

Appellant contends that after the diesel and gasoline left the vessel they were within appellee's exclusive possession and control; that by the terms of the charter party these products were at the risk and peril of the vessel only "so far as the vessel's permanent hose connections"; and that the damage to what was already in the shore tanks was not reasonably foreseeable, hence not within the contemplation of the parties. (Brief 32, *et seq.*)

As already pointed out, the District Court found that before and at the beginning of and during the voyage the appellant "negligently and improperly handled, carried, cared for and discharged said cargo," and that *as "a direct and proximate result" thereof* the appellee suffered the damage complained of (46, 47). This finding is not attacked.

It is our contention that the damage to the previously uncontaminated contents of the shore tanks was a probable and reasonably foreseeable result of the carrier's breach of duty.

From the circumstances the carrier must reasonably have known that upon the vessel's arrival at Point Wells the diesel and gasoline would be run into shore tanks at appellee's marine terminal. The carrier knew that appellee was a producer and distributor of petroleum pro-

ducts, and that the products carried would be run into shore tanks. There were no other receptacles which could accomodate this cargo. Moreover, the carrier knew that the products carried were fungible, and had every reason to foresee the possibility that upon arrival such products would be discharged into shore tanks which already contained like products. To say that the carrier had no reason to foresee this possibility is to say that the *only* reasonable possibility the carrier could foresee was that there would be empty tanks awaiting the arrival of the cargo. This would have been an unreasonable assumption on the part of the carrier. The oil business is not conducted on that basis. At least the carrier must reasonably have anticipated that the tanks into which the cargo was to be discharged *might* not be empty.

To hold appellant liable for the damage to the previously uncontaminated contents of the shore tanks it was not necessary that the circumstances which would produce this damage should have been mentioned in the negotiations between the parties at the time the charter was made. As said in 9 Am. Jur., p. 909, sec. 789 (article on "Carriers"):

> "It is not always necessary, however, that the special facts actually within the contemplation of the parties should be mentioned in the negotiations, or in express terms made a part of the contract. Wherever they are known to the carrier, under such circumstances, *or they are of such a character that the parties may be fairly supposed to have them in contemplation* in making the contract, such special facts became relevant in determining the question of damages. It is not essential that the intended use and application of the goods to be carried should, in all cases, be expressly brought to the carrier's notice at

> the time they are received, but the carrier may be liable whenever *such special use could be reasonably inferred from the known circumstances.*"

The following recent authority, very much in point, shows the propriety of permitting appellee to recover for the damage to the products in its shore tanks to which the vessel's contaminated cargo was added.

In *Armco International Corporation v. Rederi A/B Disa,* 151 Fed. (2d) 5 (2 C. C. A. 1945), a vessel carried a cargo consisting of iron plates and drums of acetic acid. The iron plates were in holds 1, 2, 3 and 4. During the voyage leaking of the acetic acid damaged the plates in holds 3 and 4. It was proved that iron plates would be damaged not only by contact with the acid but by its fumes. At the port of discharge the consignee loaded the plates "onto railroad cars, mixed all indiscriminately, regardless of the holds from which they had come;" thence they were conveyed to and stacked in a warehouse. Thus the plates from holds 3 and 4, being wet with the acid, contaminated and injured the plates from holds 1 and 2, although the latter before leaving the vessel had not been damaged by contact with the acid.

The carrier contended that it was not liable for the damage to the plates which were undamaged when they left the vessel. Disapproving this contention the Court said (p. 8):

> "She [i. e., the vessel] insists, however, that in no event should she be held for damage to the cargo after it was discharged. There are two answers to this. First, as to the plates in holds numbers three and four, the difficulty remains that the ship cannot separate the damage done ashore from that

done on board. Next, *both as to those plates and to the plates from holds numbers one and two, the damage which did happen ashore was the direct result of the negligence of the ship while the plates were on board.* Whether the consignee later contributed to that damage is another matter, which we reserve for the moment, but the situation is not one of damage arising independently of the ship's own negligence before discharge. We know of no authority that liability for the consequences of such negligence ends when the cargo goes over the rail, and such a doctrine would be absurd to the last degree."

The following cases, more particularly discussed in the footnote,[18] support the same conclusion.

---

[18]In *Dushane v. Benedict,* 120 U. S. 630 (1887), a rag dealer sold rags to a paper mill. When the rag dealer sued to recover the price of the rags, the mill operator sought recovery of a large sum by way of counterclaim for breach of plaintiff's agreement to deliver the rags free from infection. The mill operator alleged that the rags delivered were infected with smallpox; that when they were used smallpox broke out in the mill causing death and disability among the workmen, making it impossible to hire new workmen, and deterring customers from purchasing the mill's output; that the sum sought by way of counterclaim was for interruption and injury to the mill business, and for the money paid to workmen disabled by the disease. The trial court withdrew this counterclaim from the jury's consideration. This was held to be error and the judgment for plaintiff was reversed.

This case is evidently one of the cases cited by *Restatement of the Law—Contracts,* Sec. 330, to illustrate the rule of damages there laid down. Thus illustration 3 given in Sec. 330 is:

"3. A sells rags to B, with knowledge that B is a paper manufacturer, warranting them to be clean. They are in fact infected with smallpox, as A had reason to know. B's workmen catch the

Dushane v. Benedict, 120 U. S. 630 (1887);

Davis v. Clement Grain Co. (Tex. Civ. App.), 251 S. W. 545 (1923);

Marsh v. Webber, 16 Minn. 418 (1871);

Jeffrey v. Bigelow, 13 Wend. 518 (1835);

Stiefel v. Witherspoon, 71 Ind. App. 192, 124 N. E. 507 (1919);

Snowden v. Waterman, 105 Ga. 384, 31 S. E. 110 (1898).

Supporting our contention that appellant should be held to have reasonably foreseen the possibility that products from the vessel would be run into shore tanks which already contained uncontaminated gasoline and diesel, are

---

disease, his mill runs shorthanded, and his production is decreased. *B can get judgment for damages for the harm so caused, as A had reason to foresee them.*"

In *Davis v. Clement Grain Co.* (Tex. Civ. App.), 251 S. W. 545 (1923), the plaintiff employed a carrier to transport hay. Due to the carrier's negligence in furnishing a car with a leaky roof a part of the hay was ruined. Plaintiff prayed recovery for the market value of that part of the hay which was ruined, *and also prayed recovery for the additional sum of "$26 damage to the balance of the hay by reason of its being intermingled in the same car with that totally destroyed."* A judgment for the $26 was affirmed.

In *Marsh v. Webber,* 16 Minn. 418 (1871), plaintiff purchased sheep from defendant which were diseased. Plaintiff, without knowing of the disease, placed these sheep with his own flock. As a result plaintiff's flock became infected. Plaintiff sued the defendant for damages for breach of defendant's warranty that the sheep sold were sound. Plaintiff was awarded damages not only on account of the diseased sheep which he had purchased, *but also on account of the injury to the rest of plaintiff's flock by being infected by the sheep purchased.* This judgment was affirmed.

Decisions to like effect upon facts substantially like those in the case last cited will be found in *Jeffrey v. Bigelow,* 13 Wend. 518 (1835), *Stiefel v. Witherspoon,* 71 Ind. App. 192; 124 N. E. 507 (1919), and *Snowden v. Waterman,* 105 Ga. 384; 31 S. E. 110 (1898).

the following cases more particularly discussed in the footnote.[19]

---

[19]In *Sherrod v. Langdon,* 21 Iowa 518 (1866), defendant sold sheep to plaintiff warranting that the sheep were sound. Plaintiff placed the sheep with other sheep which he already owned. The sheep sold by defendant were diseased and imparted this disease to the other sheep in plaintiff's flock. Plaintiff sued for breach of warranty and recovered damages for the injury to his entire flock.

It was urged that plaintiff was not entitled to damages for injury to the sheep which plaintiff owned before the purchase unless it was shown that defendant knew at the time of the sale that plaintiff had other sheep, but the Court said (p. 519):

"Upon principle this position is not sustainable. Plaintiffs were entitled to recover all the damages of which the act complained of was the efficient cause . . . (p. 520). And upon the assumption that plaintiffs used the care and diligence required at their hands, *what matters it whether defendants knew that they had other sheep or not?* Or what difference would it make if plaintiff, in ignorance of the unsound condition of these sheep, had afterward bought other sheep, which they lost by reason of the disease communicated to them by those bought of defendants? Defendants sold the sheep with the knowledge that plaintiffs had a right to and probably would place them upon their farm; and, if guilty as charged, they would be held liable for the damages naturally and reasonably resulting from such act. It is known as a matter of fact, that most farmers in this State do keep sheep, and nothing is more important to their success than to secure good, sound flocks. If one lot is procured, there is no duty to refrain from purchasing others, lest those purchased may be unsound, and thus all be lost."

Packard v. Slack, 32 Vt. 9 (1859), upon substantially the same facts reached the same conclusion.

In *Harper Furniture Co. v. Southern Express Co.,* 148 N. C. 87; 62 So. 145 (1908), plaintiff had a mill for the manufacture of furniture. An engine shaft was shipped to plaintiff, but wrongfully delayed in transit. During the delay it was necessary to close the mill. Plaintiff claimed damages for wages paid to idle mill hands and other costs incident to such delay. Reversing a judgment of nonsuit, the Court held that these damages were properly recoverable, pointing out (62 So. at 148) that the title of the plaintiff's firm taken in connection with the nature of the implement shipped gave reasonable notice that plaintiff was a furniture manufacturer; that the size of the engine shaft necessarily gave notice of the capacity of the engine; and that the fact that it was shipped

Sherrod v. Langdon, 21 Iowa 518 (1866);

Packard v. Slack, 32 Vt. 9 (1859);

Harper Furniture Co. v. Southern Express Co., 148 N. C. 87, 62 So. 145 (1908);

White v. Louisville & N. R. Co., 16 Ala. App. 515, 79 So. 508 (1918).

Appellant refers (Brief 33) to the first sentence of par. 7 of the charter party. (Brief, Appendix 6, 7.)[20]

This paragraph refers only to damages *to the cargo. So far as damages to the cargo are concerned,* this paragraph says in effect that recovery may be had only for injury occurring on the vessel. This paragraph recog-

---

by express rather than freight gave notice that the need for the shaft was urgent. The Court said:

"The facts, we think, were such as to give clear indication that the shaft was designed for present use in the mill, and that some injury of the kind alleged would likely follow from breach of the contract of shipment . . ."

In *White v. Louisville & N. R. Co.,* 16 Ala. App. 515; 79 So. 508 (1918), upon facts similar to those in the case last referred to, the Court, reversing a judgment for defendant, said (79 So. at 510):

". . . it is not essential that the intended use and application of the goods to be carried should be expressly brought to the carrier's notice at the time they are received. *It is sufficient that such special use could have been reasonably inferred at that time from the known circumstances.*"

[20]Par. 7 of the charter party quoted by appellant reads:

"Pumping In and Out.—The cargo shall be pumped into the Vessel at the expense, risk and peril of the Charterer, and shall be pumped out of the Vessel at the expense of the Vessel, but at the risk and peril of the Vessel only so far as the Vessel's permanent hose connections, where delivery of the cargo shall be taken by the Charterer or its Consignee.

". . ."

nizes that damage to the cargo on the vessel would be a breach of the carrier's obligation.

But in the instant case the carrier's breach proximately caused other damage over and beyond the damage to the cargo. It proximately caused damage to the products in appellee's shore tanks which were never a part of the cargo. Paragraph 7 deals with the cargo and makes no attempt to deal with damages to something which was never cargo. To suggest that paragraph 7, which deals only with damage to cargo, forbids recovery of damage for something not cargo proximately caused by a breach of the carrier's duty, is to make the plain language of paragraph 7 say something it does not say, and to arrive at a result wholly at variance with paragraph 34 of the charter party which says that upon a breach of the charter "damages . . . shall include all provable damages, . . ."[21]

The only purpose intended by paragraph 7 was to fix the exact point of delivery of the cargo.

If the injury to the cargo had occurred on shore, then the case would have been different. But the injury to the cargo occurred on the vessel. For this appellee has a cause of action. For this appellee is entitled to "*all provable damages*" which may ensue. That there may be no doubt about this, this right is plainly stated in paragraph 34. The provable damages include not only the damage to the cargo injured by the carrier's negligence

---

[21]Par. 34 of the charter party reads:

"Breach.—Damages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder." (Brief, Appendix 18.)

while the cargo was on the vessel, but also the damage to the uncontaminated product in the shore tanks which was likewise injured by the carrier's negligence on the vessel which injured the cargo.

Appellant's example of the "dire consequences" which might result from such a doctrine is obviously overstated (Brief 34, 35). The carrier is only liable for the *reasonably* foreseeable consequences of its negligence which is a matter to be determined from all the circumstances, and it is clear that the damages in this case were reasonably foreseeable consequences under the circumstances presented.

(2) Damages Were Properly Allowed for the Diesel Which Was Run Into Shore Tank 8 Between 9:30 P. M. on April 23, 1943 and 6:00 A. M. on April 24, 1943.

Appellant contends that appellee failed to mitigate damages as to this quantity of *diesel* because, after discovering the contamination of the *gasoline* about 4:30 P. M. on April 23, 1943, it failed to stop discharging *diesel* until a laboratory test had been completed. (Brief 35, *et seq.*)

But appellee cannot be charged with a failure to mitigate damages unless it be shown that it had knowledge of facts requiring such action. Here appellee never had knowledge of facts which would warrant its ordering the discharge of *diesel* stopped.

The first diesel from the vessel was run into shore tank 8, commencing early in the afternoon of April 23, 1943 (78). Simultaneously gasoline from the vessel was being run into shore tank 62 (78). About 4:15 or 4:30 P. M. on that afternoon a sample taken at the dock header showed the *gasoline* to be badly discolored (80, 107, 118).

Pumping was stopped. The vessel's representatives, Messrs. Hicks and Stevens were sent for; came aboard the vessel; and made an investigation (81, 83). Thereupon they said they thought "that disposed of this matter and we could start in pumping again" (83, 141). Pumping of both products simultaneously was resumed, but successive tests taken at the dock header over a period of 15 minutes failed to show that the color of the *gasoline* was clearing. Accordingly pumping was stopped (84, 118, 119).

Someone then made the suggestion, which "the others thought . . . would be a good plan," that all valves on the boat be shut and one product only be discharged (84).

Accordingly at about 9:30 P. M. on April 23, 1943 they began discharging diesel alone (84). They continued to run the diesel into shore tank 8 until about 6:00 A. M. the following morning, when they changed the run of diesel from shore tank 8 to shore tank 41 (84, 85, 127). The discharge of diesel was completed about 6:10 P. M. on April 24, 1943 (97, 98, 127). They then discharged the remaining gasoline (98).

The switch from shore tank 8 to shore tank 41 at 6:00 A. M. on April 24, 1943 was made because shore tank 8 would not hold all of the diesel from the vessel, and additionally, they wanted some of the diesel in another tank, for with two tanks of diesel appellee's shore plant could supply trucks and boats simultaneously (121, 122).

During the evening of April 23, 1943 samples were taken from the vessel's tanks: samples of diesel from the vessel's tanks 5, 6 and 7 (96), and samples of gasoline from the vessel's tanks 2, 3 and 4 (96). Also that

evening a sample of gasoline was taken from shore tank 62 (129). The following morning about 8 o'clock a sample of diesel was taken from shore tank 8 (129). These samples were then sent to Laucks Laboratories (86). A telephone report thereon was received between 11:00 A. M. and 1:00 P. M. the same day (87). This was followed later by written analyses (Libelant's Exs. 2, 3, 4 and 5).

These reports showed the following with respect to the samples taken:

Diesel in the vessel's tanks 2, 3 and 4: merchantable (96-124).

Gasoline in the vessel's tanks 5, 6 and 7: merchantable (96-124).[22]

Diesel in shore tank 8: contaminated (97-125).

Gasoline in shore tank 62: contaminated (97-125).

In all this, a point of vital importance is overlooked in appellant's argument. *Until appellee after 11:00 A. M. on the morning of April 24, 1943 received by telephone the result of the tests of the several samples, appellant had no knowledge that anything was wrong with any of the diesel which had come from the vessel.*[23] *At that time*

---

[22]Despite the result of this test, the *gasoline* subsequently taken from these tanks on the vessel was found to be contaminated in part, for when such gasoline was first run from the vessel it was discolored and did not clear until a part thereof had been discharged. (98, 99, 133, 134.)

[23]The day the vessel arrived bottle samples had been taken from the vessel's tanks (78). These original samples showed a "good product." Discharging from the vessel was held up until these original samples had been taken and checked. It was the gauger's

they had stopped running the diesel into shore tank 8 and it was being run into shore tank 11 (127).

---

job to see that those samples met his specifications. Then he told the vessel to go ahead and start pumping. (123, 284.)

Mr. Kilbourn, appellee's plant superintendent, testified:

"The Court: . . . Do I understand, then, in the diesel oil tank, that after you started the pumping of diesel oil it came out in good order?

"The Witness: So far as we could tell it was in good order. We had no laboratory. We just used the smell and sight test.

"The Court: But it appeared to be in good order?

"The Witness: Yes. (85).

* * * * * * * * * * *

"Q. By Mr. Hall: Was there any way of telling whether the diesel oil was contaminated except by smelling it at that time? A. At that time, there was not. (85).

* * * * * * * * * * *

"Q. Did you until sometime in the morning of the following day, that is April 24, did you at any time before that believe that the diesel oil was contaminated? A. No. (86).

* * * * * * * * * * *

"Q. *Now, was the receipt of that telephone advice from Laucks Laboratories the first intimation or first knowledge you had had that the diesel shore tank 8 was contaminated?* A. *It was.*

"Q. I think you said already that none of the samples of diesel taken at the dock headers had indicated by smell any contamination with gasoline. Is that correct? A. That is right. (97).

* * * * * * * * * * *

"Q. *Now, when was it that you first learned, if you did, that there was something wrong with the diesel?* A. *Oh, it was the following 24th along, I would say, oh, between 11:00 o'clock and 1:00 o'clock in the afternoon. It was the middle of the afternoon.*

"Q. *That was when you received a telephone report from Laucks Laboratories?* A. *Yes.*

"Q. You estimate that anywhere from 11:00 o'clock until 1:00 o'clock? A. Around there some time. It was the middle of the day. (120, 121).

* * * * * * * * * * *

"The Court: . . . Did you put any more diesel oil in tank 8 after you learned that it was contaminated?

"The Witness: No." (129, 130).

The diesel first run from the vessel into shore tank 8 (at the same time that gasoline was being run from the vessel) on the afternoon of April 23, 1943 was evidently contaminated, for when appellee the next morning received advice from Laucks with respect to the sample taken from shore tank 8 it was to the effect that the contents of that tank was unmerchantable. *But this advice was the first intimation to appellee that there was anything wrong with any of the diesel which had been taken from the vessel.*

The gasoline and the diesel on the vessel were in separate tanks (15, 148). Appellee knew at about 4:00 or 4:30 P. M. on April 23, 1943 that there was something wrong with the *gasoline*. That was apparent from discoloration. *But there is nothing in the evidence indicating that appellee should have known or suspected until the morning of April 24, 1943 that any of the diesel which had been taken from the vessel was contaminated.* Thus, until the morning of April 24, 1943, appellant did not know or suspect that shore tank 8 contained any contaminated diesel, and cannot be said to have been at fault[24] in permitting diesel to run into shore tank 8 be-

---

[24]No similar contention is made with respect to the discharge of gasoline. During the afternoon of April 23, 1943, the gasoline being discharged from the vessel was found to be discolored and pumping was stopped (84, 118, 119). Pumping of the remaining gasoline from the vessel was not resumed until about 8:00 P. M. on April 24, 1943, after appellee had learned the result of the tests made by Laucks (98). When pumping of the gasoline was resumed the gasoline was run into shore tank 62 until the gasoline showed clear, when the flow was diverted into shore tank 61. (98, 99, 133, 134.) Thus, no uncontaminated gasoline from the vessel went into shore tank 62 after the time contamination was discovered in that tank.

tween 9:00 P. M. on April 23, 1943 and 6:00 A. M. on April 24, 1943.

Further, appellant has failed to offer any proof as to the amount of diesel pumped from 9:30 P. M. on April 23, 1943 until 6:00 A. M. on April 24, 1943, and has offered no proof of any act or omission on the part of appellee with respect to this portion of the cargo. Appellant attempts to create an inference now that appellee was responsible for contamination of this particular diesel because the *gasoline* was discovered to be contaminated. The burden of showing what damages, if any, resulted from this alleged fault on the part of appellee was on appellant (see *Armco International Corporation v. Rederi A/B Disa,* 151 F. (2d) 5 (2 C. C. A. 1945). It is submitted that appellant has failed to sustain this burden of proof.

IV.

Damages Allowed Properly Included the Award on Account of Attorneys' Fees.

(1) The Decree Properly Included an Award on Account of Libelant's Attorneys' Fees.

The District Court found that the sum of $8,000 was reasonably incurred by appellee as attorneys' fees on account of the services of its attorneys reasonably employed in this suit (48), and this sum was awarded to appellee as a part of its damages (53).

These fees were not allowed as costs, but were allowed under an express provision of the contract between the parties *as a part of the damages* to which appellee was entitled.

The charter party provided:

> "34. Breach.—Damages for breach of this Charter shall include all provable damages, and all costs of suit *and attorney fees incurred in any action hereunder.*" (Brief, Appendix 18.)

Where a contract by its terms provides that damages for its breach shall include attorneys' fees, allowance on account of such fees will be included in the judgment.

> *Brown v. Schroeder*, 88 Cal. App. 192, 210, 263 Pac. 325 (1927) (partnership agreement);
>
> *Bank of America v. Lane M. Co.*, 18 Cal. App. (2d) 431, 443, 63 P. (2d) 1189 (1937) (promissory note);
>
> *Campbell v. Birch*, 19 Cal. (2d) 778, 794, 122 P. (2d) 902 (1942) (lease).

Appellant does not question the power or authority of the War Shipping Administration to contract on behalf of the United States in paragraph 34 of the charter for attorneys' fees as an item of damages for a breach of the charter.[25]

Appellant contends that the Suits in Admiralty Act (46 U. S. C. A., secs. 741-752) enables private parties to do something that they could not do before its enactment, *i. e.*, sue the United States; that such Act should therefore be strictly construed; that such strict construction leads to the conclusion that the Act, since it makes no reference to attorneys' fees, while making provision for costs and interest at four per cent per annum "or at any higher rate which shall be stipulated in any contract upon which such decree shall be based," inferentially bars a recovery of attorneys' fees in suits under the Act. Counsel frankly admit that they have been unable to find authority supporting this contention.

There is nothing in the Suits in Admiralty Act indicating that a litigant under the Act is not entitled to recover damages to which he would clearly be entitled in a suit against a private individual. On the contrary sec. 3 of the Act (46 U. S. C. A., sec. 743) provides that:

> "Such suits shall proceed and shall be heard and determined *according to the principles of law* and to the rules of practice *obtaining in like cases between private parties* . . ."

Here is express authority for giving to the attorneys' fee provision in this charter party the same effect that

---

[25]Error on this account was originally assigned by par. 15 of Appellant's Assignment of Errors (62), but appellant now states (Brief 9) that this point will not be raised or argued on this appeal.

would be given to an attorney's fee provision in a lease, or promissory note, or other contract between private parties. Upon a breach of such lease, or promissory note, or contract the attorneys' fee provision would be the basis for an award of attorneys' fees *as damages*. So here, the same result should follow.

Counsel's intimation (Brief 38, 39) that an award of attorneys' fees was not mentioned until the second day of the trial, and that no *specific* prayer for attorneys' fees was originally included in the prayer of the libel, does not present a valid ground for disallowance of this item of damages.

On the second day of the trial, January 31, 1945, Mr. Hall, the proctor for libelant, called the Court's attention to paragraph 34 of the charter party (291), and inquired whether, in the event a judgment were ordered for libelant, the Court would fix attorneys' fees without proof of the attorneys' services performed (292). After some discussion the proctor for the libelant stated that he would prepare a statement of such services (292). On February 2, 1945, toward the end of the trial, such statement was presented (334), and it was then stipulated by the proctors for both parties that if Mr. Hall, who was a member of the firm which throughout the case had appeared as proctors for libelant, were called as a witness he would testify in accordance with such statement subject to objection "to any evidence relative to attorneys' fees" (334).

On March 5, 1945, prior to the making or entry of the findings and decree, the Court permitted an amendment to the libel to conform to the proof, by adding before the prayer of the libel an allegation stating the substance

of paragraph 34 of the charter party and by adding to the prayer of the libel a specific request for attorneys' fees (42).

This procedure was within the discretion of the District Court, and in accordance with established admiralty practice.[26]

(2) The Amount Awarded on Account of Libelant's Attorneys' Fees Was Reasonable.

The statement presented to the District Court during the trial on February 2, 1945, Libelant's Ex. 15 (336, 337), describes generally the services performed prior to the first day of the trial (January 30, 1945).

It was stipulated that, if called as a witness, Mr. Hall would testify that in his opinion a reasonable fee for the services of libelant's proctors was $9,000 (339).

The District Court personally observed and was in a position to assess the value of the attorneys' services performed during the trial on January 30 and 31, 1945 and February 2, 1945, as well as the details of the attorneys' services prior to the trial. For example, Rule 12 of the Rules of the District Court required libelant to present, prior to the trial date, a pre-trial memorandum. In this case the pre-trial memorandum presented by proctors for libelant comprised fifty-two printed pages. Additionally, three typewritten memoranda of points and authorities

---

[26]As said in *Benedict on Admiralty*, 6th ed., Vol. 2, page 101:

"The court is not, however, bound by the amount of damages claimed in the libel. When it appears on investigation that the libel has merit and that justice requires a larger remuneration than the libel has demanded, the court is not precluded by any technical forms from doing full justice."

were presented by proctors for libelant (337, 338), and prior to the trial they had prepared and propounded interrogatories (250). The details of these services and of other services performed, while not fully disclosed by the record on this appeal, were known to the District Court.

As admitted by appellant (Brief 40), the District Court was qualified and competent to determine the value of the attorneys' services without expert testimony as to such value.[27]

The reasonableness of this award on account of attorneys' fees depended upon a variety of factors.[28] Some are

---

[27]In *Stanolind Oil & Gas Co. v. Guertzgen,* 100 F. (2d) 299, 302 (9 C. C. A. 1938), this Court referred to "the generally accepted rule that a judge is permitted to appraise the legal services of counsel without, or independent of, any testimony on the subject."

As said in *Spencer v. Collins,* 156 Cal. 298, 307; 104 Pac. 320 (1909): "When the court is informed of the extent and nature of such services [attorneys' services], its own experience furnishes it with every element necessary to fix their value."

[28]In *Blackhurst v. Johnson,* 72 F. (2d) 644, 648 (8 C. C. A. 1934), it was said:

"In determining the question of the reasonableness of the attorney fees, many elements are entitled to consideration—the character, ability, and experience of the attorneys, the amount involved, the time necessary to prepare for trial, the difficulties and intricacies of the propositions involved, and the results obtained, as well as other elements."

In *Straus v. Victor Talking Mach. Co.,* 297 Fed. 791, 806 (2 C. C. A. 1924), it was said:

"It is matter of common knowledge that there has been a very great rise in rentals in business sections where attorneys ordinarily must have their offices, as well as a substantial advance in the compensation accorded to their employes, and, when an allowance is to be made, the court must give these facts consideration. Laymen rarely fail to figure a transaction on the basis of net profit, but, curiously, the compensation of attorneys is frequently discussed and thought of as if the attorney was the beneficiary of the whole amount awarded, without remembering that he, like the business

disclosed by the record before this Court. All must necessarily have been known to and considered by the trial judge. The latter had before him all papers filed in the cause, and was familiar with all that had occurred in Court both before and during the trial. No attempt was made by appellant to contradict or question either the showing made as to the services performed, or the opinion as to their value.[29] It is submitted that there is no reason or basis for disapproving the finding of the District Court that $8,000 was reasonable.

---

man, must first pay expenses before he can determine what he has really earned for the support of himself and those dependent upon him.

This case required a very great amount of preparation, the trial was protracted, and plaintiffs had the services of a firm of three attorneys. These attorneys tried the case with marked ability. They were opposed, not only by the able and skillful lawyers who represented the defendants at the trial, but also, in certain phases, by other counsel of high distinction. In determining what is a reasonable fee, many elements must be considered, and some of these are the character of the services rendered, the manner in which rendered, the time occupied, and the result attained. Not the least important element is the responsibility which rests upon counsel. It was not easy in this case to determine the theory upon which it should be tried. That determination demanded the courage of selection. If the action had been planned and tried upon a wrong theory, it would have failed, and thus it is that ability should be recognized as an attribute not to be measured by a yardstick."

[29]In *City of Wewoka, Okl. v. Banker*, 117 F. (2d) 839, 844 (10 C. C. A. 1941), it was said:

"Generally, an allowance of a fee to a solicitor, in this class of cases, is within the judicial discretion of the trial court and in fixing that fee the court can proceed upon its own knowledge of the value of the solicitor's services, and *the trial court's conclusion, based on the facts and his own knowledge must be accepted unless the evidence decidedly preponderates against it.*"

Conclusion.

The result of appellant's argument is that a tanker operator who undertakes delivery of two products may negligently and carelessly commingle them and render them (and other products on shore) worthless, without accountability. It is respectfully submitted that there is nothing in this case which permits such a far-reaching and unconscionable result. The decree of the District Court should accordingly be affirmed.

March 26, 1946.

PILLSBURY, MADISON & SUTRO,
LAWLER, FELIX & HALL,
FELIX T. SMITH,
JOHN A. SUTRO,
JOHN M. HALL,
Proctors for Appellee.